No. 83-92

In the Supreme Court of the United States

October Term, 1983

MARY J. LARSEN,

Petitioner,

vs.

R. FERRIS KIRKHAM, et al.,

Respondents.

BRIEF OPPOSING CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Civil Rights Act of 1964, Title VII, §§ 702 and 703, 42 U.S.C. §§2000e-1 and 2000e-2(e)(2), and the Utah Antidiscrimination Act, Utah Code Ann. §34-35-2, may constitutionally permit a school sponsored and controlled by a church to insist that the school's teaching employees are members in good standing of the church.

2. Whether officers of a church and of a school sponsored and controlled by the Church, who did not renew plaintiff's teaching contract because she was not a member of the Church in good standing, have deprived plaintiff of federal rights under color of state law for purposes of 42 U.S.C. § 1983 and § 1985.

LIST OF PARTIES

Omitted under Supreme Court Rule 34.2.

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CITATIONS TO DECISION AND JUDGMENT IN COURTS BELOW

The trial court, upon what it deemed cross motions for summary judgment, entered judgment for defendants. *Larsen v. Kirkham*, 499 F. Supp. 960 (D. Utah 1980). Upon appeal to the Court of Appeals for the Tenth Circuit, the judgment was affirmed on December 20, 1982, in an unpublished decision, and rehearing was denied January 18, 1983.

JURISDICTION

Omitted under Supreme Court Rule 34.2.

STATUTES AND CONSTITUTIONAL PROVISIONS

Omitted under Supreme Court Rule 34.2.

STATEMENT OF THE CASE

L.D.S. Business College (hereinafter the College) is a nonprofit corporation wholly owned and controlled by the Church of Jesus Christ of Latter-day Saints (R-I-178, §3(b)) which is sometimes referred to as the Mormon Church. At the time of the events referred to in the complaint, Neal A. Maxwell, one of the defendants, was the Commissioner of Education of the Church Education System, which included L.D.S. Business College and several other schools operated by the Church. R. Ferris Kirkham, another defendant, was president of L.D.S. Business College, under the authority of Commissioner Maxwell but not directly supervised by him. (R-II-118)

A substantial part of the mission of the school is to teach the religious values of the Church. (R-II-Tr. 73-74, 150) All full-time students are required to take religious instruction. Mr. Kirkham testified at trial—

> If it were not for the religious program, the Church would not operate the college. (R-II-Tr. 113)

The college requires the members of its faculty to be good examples of the application of the teachings of the Church in their private and public lives.

When the plaintiff applied for full-time employment at the College, she submitted a written application in which she stated that she "adher[ed] to the personal standards of the Church and support[ed] it spiritually, financially and intellectually." (R-II-Tr. 27) In checking her references, Mr. Kirkham found that she had not been an active Church member, but plaintiff agreed that she "was willing to become active in order to be employed by the College. (R-II-Tr. 106-07) Plaintiff was employed for the 1971-72 school year but did not become a more active participant in the Church. She was rehired for the following year "with the stipulation that she accept a probationary period relating to her religious activity." (R-II-Tr. 118) Plaintiff admits that she did not live up to the personal standards of the Church during the period in which she was employed by the College. (R-II-Tr. 36)

At the end of the 1972-73 school year, plaintiff was notified that she would not be reappointed for the succeeding year. She appealed to Kenneth Beesley, an associate commissioner of the Church Education System and of the College, who was the immediate supervisor of President Kirkham who sustained the decision not to offer her a contract for another year. (R-II-Tr. 155-57) Plaintiff promptly hired an attorney to represent her, and the College gave her a written notice that she would not be rehired on May 9, 1973. (R-II-Tr. 38, 67-68) Plaintiff's Contract expired on August 31, 1973. She filed a claim with the EEOC on November 28, 1973, received a right-to-sue letter in July, 1974, and filed this action in District Court in September, 1974.

The complaint alleged a charge of religious discrimination, and sex discrimination under the Civil Rights Act of 1964, a violation of 42 U.S.C. §1983 and §1985, violation of her right to privacy, and several other theories. All these claims except the religious discrimination claim and the claim of violation of 42 U.S.C. §§1983 and 1985 were dropped by plaintiff before judgment was entered. (R-II-Tr. 205-06, Plaintiff's Post Trial Memorandum at 2, R-I-136) The matter was tried in March, 1976, to a jury before Judge Willis W. Ritter. On the last day of the trial the jury was waived by the parties and the matter was submitted to Judge Ritter, who died thereafter without reaching a decision.

The case ultimately came to rest in the hands of Judge Bruce S. Jenkins, who ruled on opposing motions for summary judgment based upon the transcript of the 1976 trial and also upon a stipulation of issues remaining to be decided and facts agreed to with regard to those issues. (R-I-175)

SUMMARY OF THE ARGUMENT

Section 702 of Title VII, the Civil Rights Act of 1964, exempts the defendant LDS Business College from regulation by the Equal Employment Opportunity Commission (EEOC) with respect to the consideration of religious qualifications for employment. Petitioner seeks to have this provision and the related provisions in section 703, codified at 42 U.S.C. §2000e-2(e)(2) stricken as unconstitutional. The employment of teachers by church schools like LDS Business College is a particularly sensitive activity of a religious organization, be-

cause the teachers in such schools are advocates of the teachings of the Church as well as teachers of secular subjects. Serious questions of interference with First Amendment rights of churches are raised here, and petitioner has failed to show a sufficient basis for a grant of certiorari to give a full-scale review of these sections of Title VII.

Petitioner seeks also to obtain relief under the Civil Rights Act of 1866, 42 U.S.C. §§1983 and 1985, which require a showing of state action. There is no evidence or allegation that the defendant LDS Business College was under the control or direction of the state, and the personnel decision of which petitioner complains was clearly made independently of state action. No other basis for state action appears other than that church schools are permitted under Utah law to prefer their own members in good standing for teaching positions. Thus the decision of LDS Business College not to extend another one-year contract to petitioner is not fairly attributable to the state and not state action.

POINT ONE

IT IS CONSTITUTIONAL TO PERMIT A CHURCH SCHOOL TO INSIST THAT THE SCHOOL'S TEACHERS ARE MEMBERS IN GOOD STANDING OF THE CHURCH

Plaintiff has invoked constitutional review of statutes which exempt church-related schools from the Civil Rights Act of 1964 for a limited purpose of permitting them to select their faculty upon a standard of religious

preference. By urging the court to hold these laws unconstitutional, plaintiff requests the court to undertake "the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Justice Holmes), *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The decision of Congress expressed in the challenged exemptions, 42 U.S.C. 2000e-1(e)(2) and 2000e-2(e)(2), should be accorded great weight, even where the act implicates fundamental constitutional rights. *See, Fullilove*, supra, at 472, 65 L.Ed 2d at 920, *CBS v. Democratic National Committee*, 412 U.S. 94, 102 (1973).

Plaintiff argues essentially that to permit the defendant college to insist upon its religious standards impinges upon her private religious life, and that to retain her job she would have been required to do things in which she did not believe. This is nothing more than a statement that the school has used a religious test to reach its decision not to reappoint her, an outcome which is specifically permitted by the statutory exemptions which she challenges. Plaintiff was employed on a one-year contract and presents no basis for a claim arising from the decision not to extend a new contract other than the allegation that the decision was made because of a judgment that she was not complying with the school's religious-based standards.

The exemption challenged by plaintiff is similar to that at issue in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the National Labor Relations Board had asserted jurisdiction over some parochial

high schools rejecting arguments of the church schools that a violation of the First Amendment arose from the NLRB claim of jurisdiction over them. The court stated—

> In recent decisions involving aid to parochial schools we have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school. What was said of the schools in *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971), is true of the schools in this case: 'Religious authority necessarily pervades the school system.' The key role played by teachers in such a school system has been the predicate for our conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools . . .

Catholic Bishop, 440 U.S. at 502. The court quoted a remark of Justice Douglas, concurring in *Lemon v. Kurtzman*, supra, who noted "the admitted and obvious fact that the raison d'etre of parochial schools is the propagation of a religious faith." *NLRB v. Catholic Bishop of Chicago*, 440 U.S .at 503. President Kirkham testified in the case at bar that religious instruction was the prime reason for which the Church operates the L.D.S. Business College. In the *NLRB v. Catholic Bishop* decision, the court reached the conclusion that—

> The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church operated schools and the consequent serious First Amendment questions that would follow.

Id. at 504

Plaintiff seeks here to have the court establish jurisdiction of the EEOC and the courts over the employment of teachers by religious schools, a result diametrically opposed to the constitutional reasoning of *NLRB v. Catholic Bishop*. It is precisely the issue of measuring the suitability of teachers for service in the peculiarly religious mission of schools operated by churches which plaintiff would bring under governmental regulation. Plaintiff would flatly prohibit church schools from exercising discretion in hiring based upon the very values which were viewed as the basis for "serious First Amendment questions" in the NLRB case. While the NLRB sought to establish control of employer-employee relations, plaintiff seeks to go one step further and require church schools to hire persons to teach without giving attention to the class of qualifications considered most important by the churches involved and which are most central to the constitutionally protected function of such schools, namely, the loyalty and effectiveness of the employee teacher as a steward and representative of the church.

Plaintiff can draw no support from *King's Garden v. FCC*, 498 F.2d 51 (D.C. Cir. 1974), which she mistakenly cites as authority for the proposition that the exemptions which she challenges are unconstitutional. The *King's Garden* case was about whether the exemptions of religious organizations from the Civil Rights Act of 1964, Title VII, in matters of religious discrimination in employment had created a similar exemption in the powers of the FCC to regulate broadcast licensees under the Communications Act. The court in *King's Garden* concluded that there was no such exemption in

the Communications Act and that the constitutional validity of the Civil Rights Act was not at issue, but delivered in dicta a criticism of the 1972 amendments to the Civil Rights Act which broadened the exemption of religious organizations, permitting them to use a religious test in hiring all employees and not just those directly engaged in the religious activities of the organization.

Under the Civil Rights Act as originally adopted in 1964, however, church schools were permitted to discriminate in employment in favor of persons meeting a religious test. The Church College was exempt under the statute as written in 1964. And prior to 1972, in the opinion of the *King's Garden* court, "Congress had, in our view, a firm purchase on the tightrope." 498 F.2d at 56. Thus the *King's Garden* reasoning does not support petitioner's case here.

The *King's Garden* court also found that the First Amendment requires an exemption of religious organizations from regulation in certain circumstances. The court wrote—

> In addition, the guarantees of Free Exercise, Free Speech, and Free Press no doubt combine to provide a *religious group the right to choose on sectarian grounds those who will advocate, defend, or explain the group's beliefs* or way of life, either to its own members or to the world at large. *Id.* [emphasis supplied]

Petitioner was a person employed by L.D.S. Business College to "advocate, defend or explain" the beliefs and way of life of the Church, with respect to which the

school should be permitted to choose its teachers on sectarian grounds. Respondents conclude that the courts below disposed of petitioner's claim properly and urge the court to deny certiorari.

POINT TWO

THE DECISION NOT TO REHIRE THE PETITIONER DID NOT VIOLATE 42 U.S.C. §§1983 and 1985 BECAUSE IT WAS NOT STATE ACTION.

Petitioner claims that R. Ferris Kirkham and the Church College violated 42 U.S.C. §§1983 and 1985 when she was not rehired for another year. Section 1983 provides—

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Petitioner claims that she has a right or privilege in the case at bar related to her right to worship as she pleases, and that the conduct of the school was state action. Without conceding that plaintiff has a right under the circumstances of this case which is protected by the law or the constitution, it is sufficient to show that the conduct of the school is not state action.

The reasoning applied by this Court recently in *Rendell-Baker v. Kohn*, — U.S. —, 102 S.Ct. 2764 (1982)

conclusively establishes that petitioner's claim must fail. In *Rendell-Baker* the plaintiffs claimed they had been discharged by a school for maladjusted high school students in violation of their rights of free speech. The case was filed in two installments by separate plaintiffs in district court, one judge agreeing that the complaint before him stated a claim and another judge granting summary judgment for the school. The Court of Appeal consolidated the cases and found there was no state action and the Supreme Court affirmed. The Court reasoned that the appropriate analysis where a party alleges certain conduct to be state action is to inquire whether the conduct may be "fairly attributed to the state." While the school received as much as 90% of its support from public sources, and was supervised to some extent by public agencies, these facts did not change the character of the school as a contractor like any other private contractor working for the government, nor did the government involvement extend to participation in decisions to hire and fire teachers.

Petitioner Mary Larsen's claim is weaker than the one which failed in *Rendell-Baker*. The amounts of state aid flowing to students at the college are insignificant; there is no state involvement in personnel decisions, no state regulation of any of the functions provided by the school, and no state contract to purchase the services provided by the school except for government aid programs extended to students at accredited schools generally. The school is exclusively operated under the direction and control of the Church of Jesus Christ of Latter-day Saints. Petitioner has stipulated that the Col-

lege is "wholly owned *and operated*" by the Church. (Stipulation and Motion, R-I-178) [emphasis supplied].

Petitioner's theory is that state action is present in the case at bar because the state of Utah, by exempting Church-owned schools from regulation against religion-based discrimination in employment, has encouraged such discrimination and thereby made such discrimination state action, citing *Reitman v. Mulkey*, 387 U.S. 369 (1967). The *Reitman* decision struck down a California constitutional amendment which authorized private racial discrimination and which reversed the effect of earlier state laws prohibiting discrimination.

Petitioner does not present a case, however, of a malignant and unredeemable form of conduct comparable to race discrimination that is aided by state law, but rather of a balancing judgment reached by the national and state legislatures to accommodate the First Amendment rights of the Church to prefer its members in good standing within its own program. Where the choice not to employ her further was motivated by religious considerations, these considerations were an exercise of the First Amendment rights of the Church, not an exercise of state power.

Furthermore there was no conspiracy in the case at bar comparable to, for example, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 155-56 (1970), discussed by the Court in *Rendell-Baker* in footnote 6, 102 S.Ct. at 2770. A white teacher was arrested for vagrancy while accompanying six black children to an illegally segregated

lunch counter. The arresting officer had agreed with the store management to make the arrest to further the illegal segregation and thus the acts of the store were fairly attributable to the state. In petitioner's case, however, the allegations that President Kirkham had discussed the case with Neal A. Maxwell, Commissioner of the Church Educational System, were not supported with evidence, and the discussions of President Kirkham with Mr. Beesley, his supervisor, were shown to have been in the nature of a review of his decision not to reemploy the petitioner for succeeding years. These discussions were to some extent initiated and participated in by petitioner for the purpose of obtaining a reversal of the original decision. (R-II-Tr. 38, 126-27, 155-57, 159) Now petitioner ought not to be heard characterizing these discussions as a basis for finding that some of the defendants had formed an iniquitous agreement, a conspiracy, to deprive her of civil rights.

Without a finding of state action, there can be no violation of the Civil Rights Act provisions of 42 U.S.C. §§1983 and 1985, and these respondents respectfully urge the court to deny certiorari in this matter.

CONCLUSION

These respondents have argued to both the trial court and the court of appeals that petitioner's claim under the Civil Rights Act of 1964, Title VII, was barred because not timely filed (R-I-175, 177) and that there were grounds independent of religion for not rehiring petitioner for another year of teaching. (Defendant's Post Trial Memorandum at 37-39, R-I 109-111) *See, Mt. Healthy City Bd. of Education v. Doyle*, 429

U.S. 274, 285-87 (1977). These matters have not been reached but ought to be mentioned as lending further weight to the conclusion that this is not a proper case for certiorari.

Two recent decisions of this court, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and *Rendell-Baker v. Kohn*, — U.S. —, 102 S.Ct. 2764 (1982), have addressed the question of exemptions from regulation of discrimination in employment and state action in private employment discrimination, respectively, under circumstances more appealing for relief than the petitioner has presented. Applying those cases it appears clear that the exemptions from Title VII which petitioner attacks are compelled by constitutional considerations, especially when the circumstances are those of teachers in church sponsored schools, and that the conduct alleged here was not state action.

These defendants therefore respectfully urge the Court to deny certiorari.

Dated this ..... day of September, 1983.

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